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## Remedying problems with remedies

[The extended version of this month's opinion article examines the Scottish Law Commission discussion proposals on remedies for breach of contract against the SLC's stated goal of encouraging performance]

*Lorna Richardson*

On 10 July the Scottish Law Commission published its *Discussion Paper on Remedies for Breach of Contract* (Scot Law Com DP no 168 (2017), available at: [https://www.scotlawcom.gov.uk/files/3114/9968/2972/Discussion\\_Paper\\_on\\_Remedies\\_for\\_Breach\\_of\\_Contract\\_DP\\_No\\_163.pdf](https://www.scotlawcom.gov.uk/files/3114/9968/2972/Discussion_Paper_on_Remedies_for_Breach_of_Contract_DP_No_163.pdf)). This paper is part of the Commission's review of contract law in light of the Draft Common Frame of Reference, and follows on the heels of discussion papers on formation, interpretation and penalty clauses, as well as a bill on third party rights and work on counterpart execution of documents and delivery, which culminated in the Legal Writings (Counterparts and Delivery) (Scotland) Act 2015.

The *Remedies* discussion paper encompasses self-help and judicial remedies, together with transferred loss situations (where, for instance, A and B contract for work to A's property, B's performance is defective but the loss is suffered by C, to whom A has transferred the property) and contributory negligence.

To say that some of the issues considered in the discussion paper are thorny is an understatement. While it is obvious that a party faced with a breach of contract by his contracting partner has remedies available to them, which remedies and how those remedies operate is an altogether more complex issue. Is the breach material enough to allow the innocent party to withhold performance of their counterpart obligations under the contract? Is it sufficiently material to allow them to rescind the contract, thus bringing future performance of obligations to an end? Did you know that there were two different levels of materiality? And these are the problems that arise in relation to self-help remedies, the object of which is to allow a party faced with breach to take action without having to go to court!

These issues, and many others, are addressed in the discussion paper, with the Commission proposing possible reforms of the law to clarify or modernise Scots law. Responses to the questions posed in the paper are sought by 6 October 2017 (an electronic response form can be downloaded from <https://www.scotlawcom.gov.uk/law-reform/consultations/>).

The Commission has made clear that it has focused on the contract being performed as agreed, with the parties working together, so far as possible, to resolve disputes, rather than having to go to court or rescind the contract. This approach accords with a foundational principle of Scots contract law, *pacta sunt servanda*.

So to what extent do remedies currently available promote contractual performance, and do the possible reforms in the discussion paper further that end?

## Current remedies

Many remedies available to the party faced with a breach do, under current Scots law rules, encourage contractual performance. For instance, using the self-help remedy of retention, based on the principle of mutuality in contract, where A can withhold performance until B

performs their counterpart obligations under the contract, puts pressure on B to perform as required by the contract. The ability to seek specific implement and interdict also promotes performance of contractual obligations, whether positive or negative.

Yet there are many remedies currently available that do not promote continuation of the contract – for instance, the ability to rescind the contract for material breach. This remedy brings future performance of the contract to an end. Likewise, anticipatory breach, where A can accept a repudiatory breach by B, in advance of the date for performance by B, and as such bring the parties' obligations of future performance to an end. Neither of these remedies require court action. However, both remedies are only available where there has been a serious breach or anticipated breach of contract. As such their use is limited to where such breaches occur. It may be noted that both of these remedies were imported from English law, reflecting the mixed nature of Scots law.

### **The possible reforms**

The Commission seeks views on many possible reforms to the law on contractual remedies. Not all of the suggestions put forward can be discussed here. In some places the Commission seeks to clarify the law, or make changes to the vocabulary used to describe certain remedies in order to make the law easier to understand and use. In other areas more substantive changes are proposed, for consideration by consultees. Some of these proposed changes would seek to keep the contract alive, while others do not.

In terms of additional remedies that seek to preserve the contract where there is a breach, the Commission seeks views on whether the party faced with breach (referred to in the discussion paper as the creditor) should be able to seek a price reduction; and whether the creditor should be able to require the party in breach (referred to as the debtor) to cure the defect in performance, in a similar way that consumers can seek repair or replacement goods or repeat performance from a trader where the goods or service provided do not conform to contract in terms of the Consumer Rights Act 2015. The Commission also seeks views on whether a right to cure should be available for the debtor.

### **Price reduction**

One may wonder what the benefit of a price reduction remedy would be, given that a right to damages, reflecting *inter alia* the difference in value between the performance rendered and the contract price, can be sought. The Commission considers that the main benefit of price reduction would lie in its use as a self-help remedy, where the contract price has not yet been paid (para 5.6). In such a situation the creditor could pay the contract price, reduced to take account of the defect in performance. However, the currently available right of retention would generally allow the creditor to retain the entire price, given the breach of contract by the debtor. It therefore seems unlikely that a creditor would seek to utilise a remedy of price reduction, unless the breach was not material enough to justify retention.

Where retention is used, parties would have to agree on an appropriate reduction in the sum due by the creditor to take account of the loss suffered due to the debtor's breach of contract or the matter would have to be referred to court. The debtor would sue for the price, the creditor defending on the basis of retention, and counterclaiming for damages suffered as a result of the breach. While the remedy of price reduction is considered to be most advantageous as a self-help remedy, if the parties do not agree the amount of the reduction they will also end up in court. As such it is not clear that there is a gap in Scots law that the remedy of price reduction needs to fill.

## **Creditor's right to require cure**

One may question the value of a right to require cure when specific implement is available. However, it may be that specific implement would only assist where there has been no performance by the debtor, not defective performance (para 5.14). Furthermore, there are a number of categories of case where the courts have been unwilling to grant implement, including where the obligation is to supply goods and the goods are readily available from another source. Giving the creditor the right to require cure, for instance by requiring the debtor to repair or replace defective goods would therefore be an additional, and helpful remedy.

## **Debtor's right to cure**

At the opposite end of the spectrum is the debtor's right to cure. While there are some authorities that suggest such a right exists (for instance *Lindley Catering Investments v Hibernian FC* 1975 SLT (Notes) 56), the Commission notes that, except for irritancy of leases and remediable defaults under standard securities, there is no such right in Scots law. There is no general requirement on the creditor to notify the debtor of a defect in performance and provide a period for that defect to be cured before the contract can be rescinded. In 1999 the Commission, in its *Report on Remedies for Breach of Contract* (Scot Law Com no 174, 1999), considered that a right to cure shifted the focus too far in favour of the debtor. The Commission continues to be of that view (para 5.13), and notes that any such right would have to be subject to a number of qualifications, which could result in disputes between the parties. It seems unlikely that consultees will favour such a shift in favour of the party in breach.

## **Ability to rescind**

As noted above, there are some possible reforms that do not further the objective of contractual performance. If the reforms set out in the discussion paper are implemented, it will become easier to rescind.

To be able to rescind the debtor's breach must be material. That much is clear. What is much less clear is what breaches are material. This is a matter of circumstance which has to be determined in each case. The discussion paper considers changes to terminology (paras 4.2-4.18), but no significant substantive changes to the law on this issue.

Following comments from the advisory group, the Commission seeks views on whether persistent non-material breaches of contract should allow a creditor to rescind. The writer believes this could be a useful remedy. Another possible reform would allow the creditor to be more proactive prior to the date on which contractual performance is due. The Commission suggests permitting a creditor to respond to indications that the debtor is unwilling or unable to perform their obligations as and when they fall due, by seeking an adequate assurance of performance directly from the debtor, with the creditor being entitled to rescind the contract if such assurance is not received within a reasonable time.

## **Unwanted performance**

Another area in which reform is suggested is where the debtor receives unwanted contractual performance. The Commission proposes changing the law to alter the outcome of the House of Lords decision in *White & Carter (Councils) Ltd v McGregor* [1962] AC 413,

in which the majority held that the pursuer could seek payment of the contract price despite contractual performance being unwanted by the defender, who had sought to cancel the contract on the same day it was formed. The Commission proposes altering the law so that where a creditor has not yet performed and it is clear that the debtor is unwilling to receive performance, the creditor can proceed with performance and seek payment, *unless* the creditor could have made a reasonable substitute transaction without significant effort or expense; or performance would be unreasonable in the circumstances.

Seeking to alter Scots law by adding these qualifications to recovery of the contract price does not seek to uphold the contract entered into by the parties. The Commission recognises that in this situation there are two competing principles: that contracts should be performed; and that one party should not be permitted, by wasteful or unreasonable conduct, to increase the burden on the other party (para 3.34). The latter will get the upper hand if the law is reformed in line with the proposal being considered by the Commission.

### **Promoting contract performance?**

While the Commission's stated intention is that the law should encourage contracts to be performed, and some of the possible reforms would achieve that, other possible reforms do not uphold contractual performance. That this is so is not surprising. With contractual remedies, as with all areas of the law, a balance must be sought between the interests of the parties. Where there has been a serious breach or persistent breaches of contract the creditor may not wish to continue with the contract. They may no longer have faith in the debtor's willingness or ability to perform their contractual obligations. It may be in the creditor's interests to seek what they required of the debtor from another source. Forcing the creditor to continue in a contract when that is the case would be counterproductive. The law must, and does, recognise that. The possible reforms set out by the Commission also do so. Additional remedies, whether to allow continued performance or rescission, provide the creditor with more options on how to respond to a breach or anticipated breach. That is surely a good thing.

*Lorna Richardson is a lecturer in commercial law with the Law School, University of Edinburgh*